Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1573

HAROLD WITHROW, D.O.;
THOMAS HENNEY, M.D.;
A. J. SANFELIPPO, M.D.;
JOHN M. IRVIN, M.D.;
J. W. RUPEL, M.D.;
A. L. FREEDMAN, M.D.;
MARK T. O'MEARA, M.D.;
THOMAS W. TORMEY, Jr., M.D.;
individually and as members of the
Medical Examining Board of the
State of Wisconsin,

Appellants,

v.

DUANE LARKIN, M.D.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF OF APPELLANTS

ROBERT W. WARREN
Attorney General of Wisconsin

BETTY R. BROWN
Solicitor General of Wisconsin

LE ROY L. DALTON
Assistant Attorney General of Wisconsin

Counsel for Appellants

P.O. Address:
114 East, State Capitol
Madison, Wisconsin 53702

July 25, 1974

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individually and as members of the
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v.

DUANE LARKIN, M.D.,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF OF APPELLANTS

OPINIONS BELOW

The opinion of the three-judge United States District Court for the Eastern District of Wisconsin, dated December 21, 1973 (Jurisdictional Statement App. 2-4), is reported at 368 F. Supp. 796. The opinion of the Honorable Myron L. Gordon, district judge, dated October 1, 1973 (App. 47-53), is reported at 368 F. Supp. 793.

JURISDICTION

This is an action for declaratory and injunctive relief brought under the Civil Rights Act, 42 U.S.C. §1983. Jurisdiction of the district court was invoked under 28 U.S.C. §§1343, 2201, and 2281. A three-judge district court was convened and the judgment of that court, which declared sec. 448.18 (7), Wis. Stats., unconstitutional and preliminarily enjoined its utilization, was dated and entered on January 31, 1974 (Jurisdictional Statement App. 4-5). Notice of appeal therefrom was filed on March 1, 1974 (Jurisdictional Statement App. 6-7). The appeal was docketed in this Court on April 22, 1974, and probable jurisdiction was noted on June 10, 1974. Jurisdiction of this Court rests on and is conferred by 28 U.S.C. §1253.

CONSTITUTIONAL PROVISION INVOLVED

Article XIV, Section 1, Amendments to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WISCONSIN STATUTES INVOLVED

Chapter 448 — Medical Examining Board

448.17 Investigation; hearing. The examining board shall investigate, hear and act upon practices by persons licensed to practice medicine and surgery under s. 448.06, that are inimical to the public health. The examining board shall have the power to warn and to reprimand, when it finds such practice, and to institute criminal action or action to revoke license when it finds probable cause therefor under criminal or revocation statute, and the attorney general may aid the district attorney in the prosecution thereof.

448.18 Revocation. (1) "Immoral or unprofessional conduct" as used in this section mean: (a) Procuring, aiding or abetting a criminal abortion; (b) advertising in any manner either in his own name or under the name of another person or concern, actual or pretended, in any newspaper, pamphlet, circular, or other written or printed paper or document the curing of venereal diseases, the restoration of "lost manhood", the treatment and curing of private diseases peculiar to men or women, or the advertising or holding himself out to the public in any manner as a specialist in diseases of the sexual organs, or diseases caused by sexual weakness, self-abuse or excessive indulgences, or in any diseases of a like nature or produced by a like cause, or the advertising of any medicine or any means whatever whereby the monthly periods of women can be regulated or the menses reestablished, if suppressed, or being employed by or in the service of any person, or concern, actual or pretended so advertising; (c) the obtaining of any fee; or offering to accept a fee on the assurance or promise that a manifestly incurable disease can be or will be permanently cured; (d) wilfully betraying a professional secret; (e) indulging in the drug habit; (f) conviction of an offense involving

moral turpitude; (g) engaging in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public.

* * *

(7) A license or certificate of registration may be temporarily suspended by the examining board, without formal proceedings, and its holder placed on probation for a period not to exceed 3 months where he is known or the examining board has good cause to believe that such holder has violated sub. (1). The examining board shall not have authority to suspend a license or certificate of registration, or to place a holder on probation, for more than 2 consecutive 3-month periods. All examining board actions under this subsection shall be subject to review under ch. 227.

Chapter 227 — Administrative Procedure and Review

227.17 Stay of proceedings. The institution of the proceeding for review shall not stay enforcement of the agency decision; but the reviewing court may order a stay upon such terms as it deems proper, except as otherwise provided in ss. 196.43 and 551.62.

227.20 Scope of review. (1) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, testimony thereon may be taken in the court. The court may affirm the decision of the agency, or may reverse or modify it if the substantial rights of the appellant have been prejudiced as a result of the administrative findings, inferences, conclusions or decisions being:

(a) Contrary to constitutional rights or privileges; or

(b) In excess of the statutory authority or jurisdiction of the agency, or affected by other error of law; or

(c) Made or promulgated upon unlawful procedure; or

(d) Unsupported by substantial evidence in view of the entire record as submitted; or

(e) Arbitrary or capricious.

(2) Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. The right of the appellant to challenge the constitutionality of any act or of its application to him shall not be foreclosed or impaired by the fact that he has applied for or holds a license, permit or privilege under such act.

QUESTIONS PRESENTED

I. Can a district court in granting a mere motion for a preliminary injunction declare a state statute unconstitutional and preliminarily enjoin all utilization of the state statute?

II. Is the *per se* possession and exercise by an administrative agency of both statutory powers to investigate and to adjudicate a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

III. Under the circumstances of this case, did the district court have any discretion to grant a motion for a preliminary injunction and, if so, did such action constitute an abuse of discretion?

STATEMENT OF THE CASE

The appellee, hereinafter referred to as Dr. Larkin, is a resident of the State of Michigan (App. 8, 18, 56). He, on the basis of the medical licensing reciprocity agreement between the States of Michigan and Wisconsin, applied for and in August, 1971, was granted a license to practice medicine and surgery in the State of Wisconsin by the Wisconsin Medical Examining Board (App. 57), of which the appellants are members (App. 8-9, 18-19). The appellants are hereinafter referred to as members of the Board.

The Medical Examining Board is the state administrative agency which issues licenses to practice medicine and surgery in Wisconsin. It also, under the provisions of sec. 448.17, Wis. Stats., has a duty to investigate practices inimical to public health and can warn or reprimand a licensee if it finds that the licensee is engaged in such practices. If its investigation discloses probable cause for doing so, it may also complain to a district attorney and seek the institution of an appropriate criminal prosecution or of a civil action to revoke the license of the licensee.

The Board has no power to revoke or suspend a license, except under the here inapplicable provisions of sec. 448.18 (3), Wis. Stats., and under the here applicable provisions of sec. 448.18 (7), Wis. Stats. The latter authorizes the Board to temporarily suspend a license for not to exceed three months if it has good cause to believe that a licensee is engaged in immoral or unprofessional conduct as defined in sec. 448.18 (1), Wis. Stats. Revocation and other than temporary suspension of a medical license can be accomplished only after a successful court action brought by a district attorney. Sec. 448.18 (2) and (3), Wis. Stats.

Dr. Larkin, after receiving his Wisconsin license in August, 1971, immediately rented offices in Milwaukee, Wisconsin (App. 8, 18, 57), and, as subsequently learned, did so under the alias Glen Johnson (App. 57, 58). He performed abortions (App. 9, 15, 19, 57) and commuted between Detroit and Milwaukee. He initially spent Fridays, Saturdays, and Sundays doing abortions in Milwaukee (App. 63-64). After February, 1973, however, he came to Milwaukee on only very infrequent occasions and practically all abortions were performed by an associate, who received a percentage of the gross fee per abortion (App. 64).

On June 20, 1973, the Board issued and mailed to Dr. Larkin a Notice of Investigative Hearing to be held at a designated time and place on July 12, 1973 (App. 13-14). The subject of the investigation was stated therein and Dr. Larkin, either with or without counsel, was invited to attend the ex parte investigative hearing, which was to be held under the authority granted to the Board by sec. 448.17, Wis. Stats. (App. 14). Dr. Larkin was not subpoenaed to testify at such investigative hearing.

Dr. Larkin, on July 6, 1973, filed a civil rights action against the members of the Board in the United States District Court for the Eastern District of Wisconsin. In such action he sought a permanent injunction, a preliminary injunction, and a temporary restraining order enjoining the members of the Board from investigating or holding any investigative hearing on his medical practices (App. 11, 16). The motion for a temporary restraining order was denied and the court established a briefing schedule on the motion for a preliminary injunction (App. 33).

On July 12, 1973, the members of the Board filed a motion to dismiss the action on the ground that the complaint failed to state a claim upon which relief could be granted (App. 31). Larkin, on the same day, filed an unverified amended complaint (App. 18-25), a new motion for a temporary restraining order and preliminary injunction (App. 25-29), and a motion to convene a three-judge court (App. 25). The amended complaint added a request for declaratory judgment and, in addition to injunctive relief against the investigative hearing, sought a declaration that the procedures for the conduct of the investigative hearing, as authorized by sec. 448.17 and sec. 448.18, Wis. Stats., were unconstitutional (App. 23).

The investigative hearing was held by the Board on July 12 and 13, 1973 (App. 56). Numerous witnesses testified under oath, and the attorney for Dr. Larkin was present throughout the proceedings. The hearing was then adjourned to a future date. Dr. Larkin was subsequently informed in writing, through his attorney, that if he wished, he could appear before the Board and explain any of the evidence which had been presented to it during its investigation (App. 37).

On July 18, 1973, the district court denied a renewed motion for a temporary restraining order (App. 33-35) and thereafter the members of the Board filed a motion to dismiss the amended complaint (App. 37-38).

Although sec. 448.18 (7), Wis. Stats., permits the Board, without formal proceedings, to temporarily suspend a license, the Board, on September 18, 1973, mailed the following Notice of Contested Hearing to Dr. Larkin:

"TAKE NOTICE that a contested hearing will be held on the Board's own motion on October 4, 1973 * * * to determine whether the licensee has practiced medicine in the State of Wisconsin under any other Christian or given name or any other surname than that under which he was originally licensed or registered to practice medicine in this state, which practicing has operated to unfairly compete with another practitioner, to mislead the public as to identity, or to otherwise result in detriment to the profession or the public, and more particularly, whether the said Duane Larkin, M.D., has practiced medicine in this state since September 1, 1971, under the name of Glen Johnson.

"TAKE FURTHER NOTICE that the Board will also hear evidence to determine whether the licensee has permitted persons to practice medicine in this state in violation of sec. 448.02 (1), Stats., more particularly whether the said Duane Larkin, M.D., permitted Young Wahn Ahn, M.D., an unlicensed physician, to perform abortions at his abortion clinic during the year 1972.

"TAKE FURTHER NOTICE that the Board will also hear evidence to determine whether the said Duane Larkin, M.D., split fees with other persons during the years 1971, 1972, and 1973 in violation of sec. 448.23 (1), Stats.

"Based on the evidence adduced at said contested hearing, the Medical Examining Board will determine whether to suspend the license of the said Duane Larkin, M.D., under the authority of sec. 448.18 (7), Stats." (App. 45, 46).

On September 20, 1973, Dr. Larkin's attorney filed an affidavit to which he attached a copy of this notice (App. 44). Thereafter, on September 27, 1973, he filed another Motion for a Temporary Restraining Order and Interlocutory Injunction. This time he sought to restrain and enjoin the

conduct of the contested hearing and the use of sec. 448.18 (7), Wis. Stats., against him (App. 46, 47).

On October 1, 1973, and in the absence of any hearing thereon, the district court issued a decision and order in which it granted Larkin's motion to convene a three-judge court and granted a motion for a temporary restraining order enjoining the members of the Board from proceeding with the contested hearing under sec. 448.18 (7), Wis. Stats., and from enforcing the provisions of that section of the statutes against Dr. Larkin (App. 47-53). It also denied the motion of the members of the Board to dismiss the amended complaint (App. 52).

The Board, on October 4, 1973, heard some additional witnesses and concluded its investigative hearing (App. 56-59). Dr. Larkin did not appear, although his attorney did address the Board. Thereafter the Board issued its investigative findings of fact, conclusions of law, and decision (App. 56-60).

A three-judge court was appointed. The members of the Board filed an answer to the amended complaint, in which they denied all material allegations other than those identifying the parties and alleging that a notice of investigative hearing had been issued by the Board (App. 60-62). There was no consolidation of trial on the merits with the hearing on the motion for a preliminary injunction.

The three-judge court held no evidentiary hearing on the motion for a preliminary injunction or on Dr. Larkin's allegation that sec. 448.17 and sec. 448.18, Wis. Stats., were unconstitutional. Absolutely no evidence in any form was presented in support of the claim of Dr. Larkin that these two sections of the Wisconsin statutes were unconstitutional. The only support for the motion for preliminary

injunction were affidavits of Larkin's counsel, which affidavits merely placed in the record certain newspaper articles (App. 29, 41, 43), a copy of a letter from the attorney for the Board to Larkin's attorney (App. 36-37), a copy of the Board's notice of contested hearing (App. 45-46), the attorney's version of the evidence presented at the investigative hearing (App. 55, 56), and a copy of the Board's findings of fact, conclusions of law, and decision made upon completion of its investigative hearing (App. 56-60).

The three-judge court heard arguments on the motion for a preliminary injunction on November 19, 1973. On that same date it orally declared that sec. 448.18 (7), Wis. Stats., was unconstitutional on the ground, as subsequently explained in its written decision, that:

> "* * * for the board temporarily to suspend Dr. Larkin's license at its own contested hearing on charges evolving from its own investigation would constitute a denial to him of his rights to procedural due process. Insofar as §448.18 (7) authorizes a procedure wherein a physician stands to lose his liberty or property, absent the intervention of an independent, neutral and detached decisionmaker, we concluded that it was unconstitutional and unenforceable." (Jurisdictional Statement App. 2, 3.)

It, further, and in the complete absence of any evidence from or even allegations by Dr. Larkin that he had no adequate remedy at law, that he had exhausted his administrative remedies, that there was a reasonable probability of success on the merits, that he would suffer irreparable and certain harm if the relief was not granted, and that granting such relief would not cause undue harm to the public interest, granted the motion for a preliminary injunction enjoining the members of the Board from utilizing sec. 448.18 (7), Wis. Stats. It made and filed no findings of fact and conclusions of law as required by Rule 52 (a), FRCP.

On December 21, 1973, the decision of the three-judge court was filed (Jurisdictional Statement App. 2-4). Thereafter, on January 31, 1974, the court did enter a judgment (Jurisdictional Statement App. 4-5). The members of the Medical Examining Board have appealed to this Court from that judgment (Jurisdictional Statement App. 6-7).

SUMMARY OF ARGUMENT

I. A three-judge district court in granting a mere motion for a preliminary injunction cannot declare a state statute unconstitutional and commits reversible error in so doing. *Mayo v. Lakeland Highlands Canning Co.* (1940), 309 U.S. 310. It, further, cannot preliminarily enjoin *all* utilization of the state statute, since the sole purposes of a preliminary injunction are to protect the *movant* therefor from suffering irreparable injury during the pendency of the action and to preserve the court's power to render a meaningful decision after trial on the merits.

II. This Court, as well as others, has uniformly held that the *per se* possession and exercise by an administrative agency of both statutory powers to investigate and to adjudicate is not a violation of due process. *Federal Trade Comm. v. Cement Institute* (1948), 333 U.S. 683; *Marcello v. Bonds* (1955), 349 U.S. 302; and *Richardson v. Perales* (1971), 402 U.S. 389. The district court in concluding otherwise misconstrued and misapplied *Gagnon v. Scarpelli* (1973), 411 U.S. 778, and *Morrissey v. Brewer* (1972), 408 U.S. 471.

Since the enjoined hearing and proposed adjudication was an *initial* adjudication on whether the license of a licensee should be temporarily suspended, the question is not, as

perceived by the district court, whether the members of the Board were an "independent decisionmaker," as mandated by *Gagnon* and *Morrissey*, to review a prior decision or recommendation of the same agency, but is whether they are a "fair tribunal" to make an *initial* decision. In criminal and quasi-criminal prosecutions a judge is a "fair tribunal" if he is free of actual bias, has no direct, personal, substantial pecuniary interest in the outcome and no other interest strong enough to tempt him to be other than fair and impartial in making an adjudication. *Tumey v. Ohio* (1927), 273 U.S. 510, *In Re Murchison* (1955), 349 U.S. 133, and *Ward v. Village of Monroeville, Ohio* (1972), 409 U.S. 57. No court has ever held that a judge is not a "fair tribunal" merely because he, during the course of performing his official duties, had previously been exposed to information about a defendant. *Federal Trade Comm. v. Cement Institute* (1948), 333 U.S. 683. The members of the Board herein must be a "fair tribunal" since they do meet the standards or tests as set by this Court for determining when a judge in a criminal prosecution is a "fair tribunal." *Federal Trade Comm. v. Cement Institute* (1948), 333 U.S. 683. For various reasons, here suggested but irrelevant since this Board does meet such standards, an administrative board should not be required to meet all of the standards or tests of a "fair tribunal" as applied to a judge in a criminal prosecution.

If the decision of the district court, that the *per se* possession and exercise by an administrative agency of both powers to investigate and to adjudicate is a violation of due process, is correct, it will destroy, as presently structured, all major administrative agencies, including those whose adjudications fall within the coverage of the Federal Administrative Procedure Act. They all possess and exercise both powers, and if the decision is correct, mere internal separation of functions within the agency is insufficient to comply with the requirements of due process.

III. The district court had no discretion to issue a preliminary injunction in this case, not only because the motion therefor was inadequate under Rule 7 (b), FRCP, and was outside the scope of the subject matter of the action, but also because there was a total and complete absence of ANY evidence presented to the court establishing that such relief was available in this case and a total and complete absence of ANY evidence presented to the court establishing grounds for the granting of the motion. The moving party, who has the burden of so showing, presented no evidence to the court establishing ANY of the following: that he had no adequate remedy at law; that he had exhausted his administrative remedies; that he would suffer "irreparable injury" if the requested relief was not granted; that the federal question presented was "grave" and "substantial" and, therefore, he had a substantial likelihood of success on the merits or that the requested relief would not cause undue harm to the public interest. Because of this, the district court could not and did not make the findings of fact and conclusions of law required by Rule 52 (a), FRCP.

If the district court possessed any discretion to grant the motion, it abused that discretion by the above-described action, but also by its noncompliance with various applicable requirements of the Federal Rules of Civil Procedure and by its granting of preliminary injunctive relief which is so overly broad that it even exceeded the relief requested by the moving party.

ARGUMENT

I. The Judgment Granting A Preliminary Injunction Must Be Reversed Because The District Court Therein Improperly Declared A State Statute Unconstitutional And Improperly Preliminarily Enjoined All Utilization Of That Statute.

After unsuccessful attempts to halt the members of the Board from conducting an ex parte investigative hearing into his medical practices, as authorized by sec. 448.17, Wis. Stats., Dr. Larkin, on September 27, 1973, filed another Motion for Temporary Restraining Order and Interlocutory Injunction. This time he sought the restraining and enjoining of the members of the Board from conducting a contested hearing, under the provisions of sec. 448.18 (7), Wis. Stats., to determine whether his license to practice medicine should be temporarily suspended and from "in any way enforcing the provisions of Sec. 448.18 (7), Wis. Stats., against the plaintiff" (App. 46). This motion was inadequate under Rule 7 (b), FRCP,[1] and it was also beyond the scope of the subject matter of the action.[2]

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1. Rule 7 (b), FRCP, requires that a motion "shall state with particularity the grounds therefor." "Irrevocable harm" is NOT a ground for granting a motion for a temporary restraining order or a preliminary injunction. Absolutely no ground for granting such relief was stated in this motion, in any of the previous motions, or in any of the affidavits previously filed.

2. As revealed by the content of the unverified amended complaint (App. 18, 24), the subject matter of the action was solely the constitutionality of the conduct by the members of the Board of the *ex parte investigative hearing*. The ultimate relief sought was only a declaratory judgment and a permanent injunction against that *investigative* hearing (App. 23, 24).

Despite this and despite the absence of any evidence in support of the granting of the motion, the single-judge district court, without a hearing, did, on October 1, 1973, grant Larkin's September 27 motion for a temporary restraining order. It also granted his previous motion to convene a three-judge court (App. 52) and denied the motion of the members of the Board to dismiss the action (App. 52).

A hearing on the motion for a preliminary injunction was held before the three-judge court on November 19, 1973. There had been and was at the hearing no consolidation of the hearing on the motion with trial on the merits as can be done under the provisions of Rule 65 (a) (2), FRCP. At the hearing Dr. Larkin presented absolutely no testimony or other evidence either in support of his motion or in support of any attack on the constitutionality of sec. 448.18 (7), Wis. Stats. The hearing consisted exclusively of oral argument on the groundless motion for a preliminary injunction.

The three-judge court not only immediately granted the groundless and completely unsupported motion, but it actually declared that sec. 448.18 (7), Wis. Stats., "is unconstitutional" (Jurisdictional Statement App. 4), a declaration which was not even sought by Dr. Larkin in the only motion before the court (App. 46, 47). The judgment of the three-judge court granting the preliminary injunction reads:

> "It is Ordered and Adjudged that §448.18 (7), Wis. Stats., is unconstitutional and that the defendants are preliminarily enjoined until further notice from utilizing the provisions of §448.18 (7), Wis. Stats." (Jurisdictional Statement App. 5.)

This one-sentence judgment not only does not comply with the requirements of Rule 65 (d), FRCP,[3] but it contains two fatal errors.

A. A district court cannot declare a state statute unconstitutional in deciding and granting a mere motion for a preliminary injunction.

A three-judge district court, in granting a mere motion for a preliminary injunction, cannot declare a state statute to be unconstitutional. This Court unanimously so held in *Mayo v. Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774, and reversed the judgment therein. In *Mayo*, after pointing out that a three-judge court had declared a state statute unconstitutional in granting a mere motion for preliminary or temporary injunction, this Court wrote (309 U.S. at 316):

> "We think the court committed *serious error* in thus dealing with the case upon motion for temporary injunction. *The question before it was not whether the act was constitutional or unconstitutional;* was not whether the Commission had complied with the requirements of the act, if valid, *but was whether the showing made raised serious questions, under the Federal Constitution and the state law, and disclosed that enforcement of the act, pending final hearing, would inflict irreparable damages upon the complainants.*" (Emphasis added.)

In his brief to this Court in support of his Motion to Dismiss or Affirm, p. 28, Dr. Larkin admits that the district

3. See *Schmidt v. Lessard* (1974), — U.S. — , 94 S.Ct. 713, 38 L.Ed. 2d 661, in which another inadequate judgment of this same district court was vacated for lack of compliance with Rule 65 (d), FRCP.

court improperly declared the state statute unconstitutional. This point, therefore, will not be argued further.

B. A district court cannot preliminarily enjoin all utilization of a state statute.

The judgment, quoted *supra*, also preliminarily enjoins the members of the Board from utilizing the provisions of sec. 448.18 (7), Wis. Stats., to temporarily suspend the license of any licensee, not just Dr. Larkin, and they are so enjoined whether or not they have previously conducted an investigative hearing under the provisions of sec. 448.17, Wis. Stats. This overly broad and again unsought (App. 46, 47) injunctive relief is completely beyond the scope of a preliminary injunction and is beyond the power of the district court in granting such an injunction.

A preliminary injunction is a device for maintaining the status quo between the parties to an action pending a decision of the action on the merits. The purposes of a preliminary injunction are to protect the movant therefor, here only Dr. Larkin, from suffering irreparable injury during the pendency of the action and to preserve the court's power to render a meaningful decision after trial on the merits of the case. See 11 Wright and Miller, *Federal Practice and Procedure*, §2947, p. 423. A district court in granting a motion for a preliminary injunction has no power to enjoin all utilization of a statute. It has power only to enjoin the use of the statute against the party seeking the preliminary injunction.

C. These errors are serious and require the reversal of the judgment.

Dr. Larkin's brief to this Court in support of his Motion to Dismiss or Affirm, pages 28 and 29, admits the existence of these errors, but characterizes them as "technical" and the members of the Board's objections to them as "hyper-technical." He ends his brief by claiming that no harm was done. Any improper assumption and exercise of power is a serious harm and particularly when, as here, it temporarily destroys or appreciably diminishes the power of a state to protect the health and welfare of its citizens.

These errors are not "technical." They strike at the very heart of state-federal relationships. The completely improper, baseless, careless, and casual declaration that a presumptively constitutional[4] state statute is unconstitutional in deciding a groundless and unsupported motion for a preliminary injunction and the preliminary enjoining of all utilization of that statute is the very type of "improvident statewide doom by a federal court of a state's legislative policy,"[5] which motivated Congress to pass the three-judge court act, 28 U.S.C. §2281. It is no better, however, to

4. The presumption of constitutionality of a state statute "is the postulate of constitutional adjudication." *New York v. O'Neill* (1959), 359 U.S. 1, 6, 79 S.Ct. 564, 3 L.Ed. 2d 585. As pointed out in *Mayo* (309 U.S. at 318 and 319), the mere presumption of constitutionality requires the denial of a motion for a preliminary injunction, except in extraordinary situations where findings of fact, based on *evidence*, support a conclusion of law that there is a substantial question of constitutionality presented. Here there was NO evidence at all.

In *O'Gorman & Young v. Hartford F. Ins. Co.* (1931) 282 U.S. 251, 257, 258, 51 S.Ct. 130, 75 L.Ed. 324, 72 A.L.R. 1163, Justice Brandeis wrote that when, as here, a statute falling within the police powers of the state is involved "the presumption of constitutionality *must prevail* in the absence of some *factual foundation of record* for overthrowing the statute."

5. *Phillips v. United States* (1941), 312 U.S. 246, 251, 61 S.Ct. 480, 85 L.Ed. 800, and *Moody v. Flowers* (1967), 387 U.S. 97, 101, 87 S.Ct. 1544, 18 L.Ed. 2d 643.

have three judges improperly "able to paralyze totally the operation of an entire regulatory scheme, either state or federal, by issuance of a broad injunctive order"[6] than to have a single federal judge do so.

The statute here involved is an exercise of the state's police power to protect the health and welfare of its citizens.[7] As recognized in *Geiger v. Jenkins* (N.D. Ga. 1970), 316 F. Supp. 370, 373, which was affirmed in *Geiger v. Jenkins* (1971), 401 U.S. 985, 91 S.Ct. 1236, 28 L.Ed. 2d 525:

> "* * * The right to practice medicine is a conditional right which is subordinate to the state's power and duty to safeguard the public health, and it is the universal rule that in the performance of such duty and in the exercise of such power, the state may regulate and control the practice of medicine and those who engage therein, subject only to the limitation that the measures adopted must be *reasonable, necessary, and appropriate to accomplish the legislature's valid objective of protecting the health and welfare of its inhabitants. See* McNaughton v. Johnson, 242 U.S. 344, 37 S.Ct. 178, 61 L.Ed. 352 (1917); Dent v. West Virginia, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889); 41 Am. Jur., Physicians and Surgeons, §§3-8. It is beyond dispute that the power of the State to regulate the practice of medicine includes the power to create an administrative board and vest in it the supervision of such regulation. Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086 (1935). * * *" (Emphasis added.)

6. *Kennedy v. Mendoza-Martinez* (1936), 372 U.S. 144, 154, 83 S.Ct. 554, 9 L.Ed. 2d 644.

7. *Barsky v. Board of Regents of N.Y.* (1954), 347 U.S. 442, 74 S.Ct. 650, 98 L.Ed. 829.

See, also, *Barsky v. Board of Regents of N.Y.* (1954), 347 U.S. 442, 74 S.Ct. 650, 98 L.Ed. 829.

Section 448.18 (7), Wis. Stats., grants to the Board its only power to suspend the license of a physician engaged in specifically defined immoral or unprofessional conduct. It is obviously "reasonable, necessary, and appropriate to accomplish the legislature's valid objective of protecting the health and welfare of its inhabitants." The district court's improper declaration of unconstitutionality and its improper preliminary enjoining of all utilization of the statute leaves a gaping hole in Wisconsin's already feeble defense of the health and welfare of its citizens against the activities of unscrupulous physicians.

The errors of the district court are very serious and, as in *Mayo v. Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774, require reversal of the judgment.

II. The *Per Se* Possession And Exercise By An Administrative Agency Of Both Statutory Powers To Investigate And To Adjudicate Is Not A Violation Of The Due Process Clause Of The Fourteenth Amendment To The United States Constitution.

In the performance of its statutory duty, sec. 448.17, Wis. Stats., to investigate, hear, and act on "practices inimical to public health" by a licensee, the Wisconsin Medical Examining Board conducted an ex parte investigative hearing into the medical practices of Dr. Larkin. Thereafter, but prior to the conclusion of the investigative hearing, it gave

notice to Dr. Larkin of a contested hearing[8] on the question of whether his license to practice medicine in Wisconsin should be temporarily suspended by the Board under the authority granted to it by sec. 448.18 (7), Wis. Stats., to temporarily suspend for no more than three months the license of a licensee engaged in "immoral or unprofessional conduct" as defined in sec. 448.18 (1), Wis. Stats. "Practices inimical to the public health" and "immoral or unprofessional conduct" are not the same thing, although, of course, the same acts may constitute both.

The record herein is devoid of any showing that, upon receipt of the Notice of Contested Hearing, Dr. Larkin appeared before the Board and asked that any or all members thereof disqualify themselves, for any reason, from conducting a contested hearing and adjudicating the question of whether or not his license should be temporarily suspended. Instead, and without any amendment of his amended complaint to include within its scope the subject of a contested hearing under sec. 448.18 (7), Wis. Stats., Dr. Larkin procured from the district court orders enjoining the conduct of the contested hearing.

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8. Under the provisions of ch. 227, Wis. Stats., and Wisconsin case law a "contested" case or hearing is one at which the subject must have previously been given "a clear and concise [written] statement of the issues" (227.09); he is entitled to be represented by counsel; the burden of proof is on his adversary, who is represented by an assistant attorney general; he has a right to cross-examine the witnesses against him and can present witnesses and other evidence in his behalf (227.10); an official record of the hearing, including all exhibits and testimony, must be kept (227.11); the decision must be in writing accompanied by findings of fact and conclusions of law (227.13); the decision must be served on the subject (227.14); the decision is subject to judicial review (227.15) and the scope of that review includes not only the content of the decision but also "the constitutionality of any act or of its application to him" (sec. 227.20); and pending the completion of judicial review, the decision of the agency may be stayed by the court (sec. 227.17).

See also *LeBow v. Optometry Examining Board* (1971), 52 Wis. 2d 569, 191 N.W. 2d 47, and *Kachian v. Optometry Examining Board* (1969), 44 Wis. 2d 1, 170 N.W. 2d 743.

The district court's decision granting the preliminary injunction reads:

> "* * * What we determined was that for the board temporarily to suspend Dr. Larkin's license at its own contested hearing on charges evolving from its own investigation would constitute a denial to him of his rights to procedural due process. Insofar as §448.18 (7) authorizes a procedure wherein a physician stands to lose his liberty or property, absent the intervention of an independent, neutral and detached decisionmaker, we concluded that it was unconstitutional and unenforceable.
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> "* * *
>
> "* * * The state medical examining board does not qualify as such a decisionmaker. * * *" (Jurisdictional Statement App. 2, 3, 4.)

This, then, is NOT a decision based on the existence of any actual bias against Dr. Larkin by any or all members of the Board; it is NOT a decision based on the possession by any or all Board members of a direct personal or pecuniary interest in the outcome of the proposed contested hearing, and it is NOT a decision based on any claim that any or all members of the Board were illegally sitting as such or that the Board was illegally constituted.

The decision IS solely that, if the members of the Board perform their statutory duty to investigate practices inimical to public health by conducting an ex parte investigative hearing of the medical practices of a licensee, they cannot, consistent with procedural due process, also exercise their statutory right and duty to adjudicate, after a contested

hearing, whether the license of a licensee engaged in immoral or unprofessional conduct should be temporarily suspended.[9]

This never has been, is not, and never should be the law.

A. It has been uniformly held by this and other courts that mere possession and exercise of both an investigative and an adjudicative function by an administrative agency is not a violation of due process.

1. This Court has so held.

In *Federal Trade Comm. v. Cement Institute* (1948), 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010, reh. den. 334 U.S. 839, 68 S.Ct. 1492, 92 L.Ed. 1764, this Court found that members of the Federal Trade Commission, who on the basis of prior official investigations by them had concluded and publicly expressed the opinion that a certain cement industry trade practice was illegal, properly refused to disqualify themselves from hearing and passing on the same practice by members of that industry in contested proceedings to determine whether cease and desist orders should issue. In so concluding, this Court discussed the difference

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9. Although the decision refers to the members of the Board making an "investigation" there is no evidence in the record that any of them personally made an investigation in the sense of going out and searching out the facts from potential witnesses and other sources. In fact, none of the members, who are unpaid, part-time, practicing physicians from various parts of the state, did so. An agency employe, who is not a Board member, did all of the actual investigating. The members of the Board only investigated in that they conducted the investigative hearing authorized by sec. 448.17, Wis. Stats., at which the evidence gathered by the investigator was presented to them by an assistant attorney general in the form of the sworn testimony of witnesses and other evidence.

between an ex parte investigation and a contested hearing and also discussed the rule of necessity, both of which discussions are also applicable to the present case.

In addition to the disqualification question, the claim was made in the above-cited case that it was a violation of due process for the members of the Federal Trade Commission to adjudicate, after having conducted an ex parte investigation and having determined that the involved practice was illegal. This Court also rejected that argument and wrote (333 U.S. at 702, 703):

> "Marquette also seems to argue that it was a denial of due process for the Commission to act in these proceedings after having expressed the view that industry-wide use of the basing point system was illegal. A number of cases are cited as giving support to this contention. Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, 50 A.L.R. 1243, is among them. But it provides no support for the contention. In that case Tumey had been convicted of a criminal offense, fined, and committed to jail by a judge who had a direct, personal, substantial, pecuniary interest in reaching his conclusion to convict. A criminal conviction by such a tribunal was held to violate procedural due process. But the Court there pointed out that most matters relating to judicial disqualification did not rise to a constitutional level. Id., at page 523 of 273 U.S., at page 441 of 47 S.Ct., 71 L.Ed. 749, 50 A.L.R. 1243.
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> "Neither the Tumey decision nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court."

This Court has also held in a number of deportation cases, including *Marcello v. Bonds* (1955), 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107, that the right to due process was not violated because the Immigration Service has investigative, prosecutorial, and adjudicative functions and because a special inquiry officer, who exercised the adjudicative function, was subject to supervision and control by officials having investigative and prosecutorial functions.

In *Pickering v. Board of Education* (1968), 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811, this Court refused to decide a late-blooming issue of procedural due process occasioned by "multiple functioning" of a school board "vis-a-vis appellant," but this Court did, in *Richardson v. Perales* (1971), 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed. 2d 842, quickly dispose of a claim comparable to the issue in this case and in a way contrary to the decision of the lower court herein.

In *Richardson* it was argued to this Court that there was a denial of due process because the hearing examiner who heard and decided the case was not "an independent hearing examiner" in that he also had responsibility for gathering the evidence. This Court wrote (402 U.S. at 410):

> "Neither are we persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity. The social security hearing examiner, furthermore, does not act as counsel. *He acts as an examiner charged with developing the facts.* The 44.2% reversal rate for all federal disability hearings in cases where the state agency does not grant benefits * * * attests to the fairness of the system and refutes the implication of impropriety." (Emphasis added.)

"Developing the facts" is an investigative function and, therefore, this decision also is that combining investigative and adjudicative functions in a hearing examiner, let alone in a whole administrative agency, is not a denial of procedural due process.

There are some similarities, as well as glaring and decisive dissimilarities, between this appeal and that in *Gibson v. Berryhill* (1973), 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488. In that case, this Court on the basis of considerations of equity, comity, and federalism vacated the judgment of a three-judge court in which that lower court had enjoined the members of the Alabama Optometry Board from conducting hearings on license revocation and from revoking the licenses of certain corporation-employed optometrists. This Court, however, agreed with the determination of the lower court that, under the unique facts of the case, the members of the Board were disqualified from proceeding with the hearings because of bias based on substantial pecuniary interest in the outcome of the proceedings. This Court, therein, carefully noted, at 93 S.Ct. 1698 and footnote 17, that it did not reach and was not deciding the here involved question of the extent to which an administrative agency may investigate and act and then, consistent with due process, sit as an adjudicative body.

The decisions of this Court, as illustrated above, are that it is not a violation of due process for an administrative agency to possess and exercise both investigative and adjudicative functions.

2. Other courts have so held.

There are a large number of lower federal court decisions on the question of the mixing of investigative, prosecutorial,

and adjudicative functions in an administrative agency, including boards and commissions, and on the propriety of the exercise of all such functions by the same agency or board. All of these cases have held that, in the absence of proof of actual bias, a direct personal, substantial, pecuniary interest in the outcome of the proceeding or a personal interest in an individual board member because of his prior involvement in an adversary capacity, it is not a violation of due process for the members of a board, commission, or other type of administrative agency to possess and exercise both the power to investigate and the power to adjudicate.[10]

The federal case most comparable to the present case is *Pangburn v. C.A.B.* (1st Cir. 1962), 311 F. 2d 349. In that case the Civil Aeronautics Board in the exercise of its statutory duty to investigate civil aircraft accidents did investigate and did issue a report indicating that an accident was caused by pilot error. The Board thereafter performed an adjudicative function in respect to the pilot involved in that accident by affirming the decision of an employe to

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10. For example, see *Duke v. North Texas State University* (5th Cir. 1973), 469 F. 2d 829, cert. den. 93 S.Ct. 2760; *Simard v. Board of Education of Town of Groton* (2d Cir. 1973), 473 F. 2d 988; *Villani v. New York Stock Exchange* (S.D. N.Y. 1972), 348 F. Supp. 1185; *Intercontinental Indus. Inc. v. American Stock Exchange* (5th Cir. 1971), 452 F. 2d 935; *Mack v. Florida State Board of Dentistry* (5th Cir. 1970), 430 F. 2d 862; *Belsinger v. District of Columbia* (D. D.C. 1969), 295 F. Supp. 159; *Lehigh Portland Cement Company v. F.T.C.* (E.D. Va. 1968), 291 F. Supp. 628; *Federal Trade Comm. v. Cinderella Career and Finishing Schools, Inc.* (D.C. Cir. 1968), 404 F. 2d 1308; *Wasson v. Trowbridge* (2d Cir. 1967), 382 F. 2d 807; *Securities and Exchange Commission v. R. A. Holman & Co.* (D.C. Cir. 1963), 323 F. 2d 284, cert. den. 375 U.S. 943; *Pangburn v. C.A.B.* (1st Cir. 1962), 311 F. 2d 349; *Amos Treat & Co. v. Securities and Exchange Commission* (D.C. Cir. 1962), 306 F. 2d 260; *Holt v. Raleigh City Board of Education* (4th Cir. 1959), 265 F. 2d 95, cert. den. 361 U.S. 818; *Trans World Airlines v. Civil Aeronautics Board* (D.C. Cir. 1958), 254 F. 2d 90; *United States ex rel. Dolenz v. Shaughnessy* (2d Cir. 1952), 200 F. 2d 288; *Belizaro v. Zimmerman* (3rd Cir. 1952), 200 F. 2d 282; and *Brinkley v. Hassig* (10th Cir. 1936), 83 F. 2d 351.

suspend the pilot's certificate for 90 days because of negligence. It was claimed that this combination of investigative and adjudicative functions in the Board denied to the pilot due process of the law since the Board could not be the required "impartial tribunal" in adjudicating because of its investigative activities and published opinion that the accident was due to pilot error. This claim was unanimously rejected by the court of appeals, which wrote, p. 356:

> "It is well settled that a combination of investigative and judicial functions within an agency does not violate due process. Belizaro v. Zimmerman, 200 F. 2d 282 (3rd Cir., 1952); United States ex rel. Catalano v. Shaughnessy, 197 F. 2d 65 (2nd Cir., 1952); Levers v. Berkshire, 159 F. 2d 689 (10th Cir., 1947); Roccaforte v. Mulcahey, 169 F. Supp. 360 (D.C. Mass. 1958), aff'd, per curiam, 1 Cir., 262 F. 2d 957; Brinkley v. Hassig, 83 F. 2d 351 (10th Cir., 1936), 2 Davis, Administrative Law Treatise, §13.02. See, Federal Trade Comm. v. Cement Institute, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010 (1948). Indeed that provision of the Administrative Procedure Act which prohibits the same person from investigating and rendering a decision in the same matter, expressly excludes from its operation 'the agency * * * or any member or members of the body comprising the agency.' (5 U.S.C. §1004)."[11]

That court, then, considered various cases and, thereafter, wrote, p. 358, the following which is completely appropriate to the present case:

> "Upon examination of the foregoing cases, we cannot say that the mere fact that a tribunal has had contact with

11. 5 U.S.C. §1004 is now 5 U.S.C. §554 (d).

> *a particular factual complex* in a prior hearing, or indeed has taken a public position on the facts, is enough to place that tribunal under a constitutional inhibition to pass upon the facts in a subsequent hearing. We believe that more is required. Particularly is this so in the instant case where the Board's prior contact with the case resulted from its following the Congressional mandate to investigate and report the probable cause of all civil air accidents. If we were to accept petitioner's argument, it would mean that because the Board obeyed the mandate of Section 701, it was thereupon constitutionally precluded from carrying out its responsibilities under Section 609." (Emphasis added.)

The completely irrational result of the decision in this case, which result was rejected by the court of appeals in *Pangburn*, is that if the Board performs its duty to investigate under sec. 448.17, Wis. Stats., it cannot perform its duty to adjudicate another question under sec. 448.18 (7), Wis. Stats., merely because it has been exposed to a "particular factual complex." The decision of the district court herein turns an investigation into an immunization of its subject against temporary suspension of his license even though he is endangering the health and welfare of the public by engaging in immoral or unprofessional conduct.

State supreme courts have also found no violation of due process in the mere *per se* mixture of functions within administrative agencies. In general, see 2 Davis, *Administrative Law Treatise*, §13.02, 1 Am. Jur. 2d, *Administrative Law*, §§77 and 78, and 97 A.L.R. 2d 1210 and the later case service thereto.[12]

12. Recent Wisconsin Supreme Court cases on this subject include *Kachian v. Optometry Examining Board* (1969), 44 Wis. 2d 1, 170 N.W. 2d 743, and *LeBow v. Optometry Examining Board* (1971), 52 Wis. 2d 569, 191 N.W. 2d 47.

B. This district court's contrary decision is the result of misapplication and misconstruction of certain inapplicable decisions of this Court.

The decision of the lower court cites *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed. 2d 656, and *Morrissey v. Brewer* (1972), 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484, which deal with parole and probation revocation, for the proposition that one of the elements of minimal due process is an "independent decisionmaker." This is true, but it, then, inappropriately applied these cases to the present situation and determined that:

> "* * * The state medical examining board does not qualify as such decisionmaker. It cannot properly rule with regard to the merits of the same charges it investigated * * *." (Jurisdictional Statement App. 3, 4.)

This record in no way supports a conclusion that the Board proposed to "rule with regard to the merits of the same charges it investigated." The Board had merely been exposed to a "particular factual complex." Further, however, there is absolutely nothing in *Gagnon, Morrissey,* or *Goldberg v. Kelly* (1970), 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287, which involved termination of welfare benefits, which supports this determination by the lower court. These cases neither indicate that an administrative agency, such as the Medical Examining Board, cannot qualify as an independent decisionmaker nor do they have anything to say on the subject of the possession and exercise of both investigative and adjudicative functions by an administrative agency. They deal with *review of the decision* of an agency by the same agency, i.e., performing an adjudicative function to determine the correctness of its own prior adjudication or recommendation.

These cases stand for the proposition that review of the decision or recommendation of agency personnel to terminate welfare benefits or to revoke parole or probation must be conducted by some person within the agency other than the initial decisionmaker. This is made clear in *Goldberg* when this Court wrote (397 U.S. at 271):

> "* * * And, of course, an impartial decision maker is essential. * * * We agree with the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. *He should not, however, have participated in making the determination under review.*" (Emphasis added.)

In *Morrissey* this Court further explained (408 U.S. at 486) that:

> "* * * *The officer directly involved in making recommendations cannot always have complete objectivity in evaluating them.* Goldberg v. Kelly found it unnecessary to impugn the motives of the caseworker to find a need for *an independent decisionmaker to examine the initial decision.*
>
> "This independent officer need not be a judicial officer. The granting and revocation of parole are matters traditionally handled by administrative officers. In Goldberg, the Court pointedly did not require that the hearing on termination of benefits be conducted by a judicial officer or even before the traditional 'neutral and detached' officer; it required only that the hearing be conducted by some person *other* than one initially dealing with the case. * * *" (Emphasis added.)

What *Goldberg, Morrissey,* and *Gagnon* mandate in the present case is that IF the members of the Board had made a decision that the medical license of Dr. Larkin should be

temporarily suspended, they could not, consistent with minimal due process requirements, review the correctness of their own decision. Under these circumstances, the members of the Board would not be the required "independent decisionmaker" because they would be reviewing their own determination. Of course, none of this happened in the present case since there was no prior decision by the Board to temporarily suspend Dr. Larkin's license to practice medicine in Wisconsin.

Further, it would not have happened, since the very subsection of the Wisconsin statutes, which the lower court erroneously declared to be unconstitutional, requires review by an independent decisionmaker of any decision by the Board to temporarily suspend a license to practice medicine. Section 448.18 (7), Wis. Stats., concludes with the following provision:

> "* * * All examining board actions under this subsection shall be subject to review under ch. 227."

Chapter 227, Wis. Stats., provides for judicial review of administrative agency decisions by the Circuit Court of Dane County, Wisconsin. A circuit judge is not only an "independent decisionmaker" as required by *Goldberg, Morrissey,* and *Gagnon,* but he is a "neutral and detached" judicial officer, which is specially not required. Dr. Larkin, therefore, would have received even more than minimal due process and the very subsection of the statutes improperly as well as erroneously declared by the lower court to be unconstitutional because it did not provide for an "independent decisionmaker," clearly and unequivocally provides even more than the required "independent decisionmaker."

Federal cases subsequent to *Goldberg,* holding that due process was not violated in a situation where the administrative decisionmaker had also performed an investigative

function, include *Richardson v. Perales* (1971), 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed. 2d 842, and *Duke v. North Texas State University* (5th Cir. 1973), 469 F. 2d 829, cert. den. 93 S.Ct. 2760.

C. Even though the Board had conducted an ex parte investigative hearing into the medical practices of a licensee, it is a "fair tribunal" to adjudicate whether the license of the licensee should be temporarily suspended.

The actual question in this case was misconceived by the district court. It is not whether the members of the Board are an "independent decisionmaker," as required by *Goldberg, Morrissey,* and *Gagnon,* for the review of a decision previously made by the Board. Instead, the actual question is whether the Board is the "fair tribunal" or the "impartial tribunal" required by due process to make an initial decision on whether Dr. Larkin's license to practice medicine in Wisconsin should be temporarily suspended.

1. The Board meets the standards for determining a "fair tribunal" in a criminal prosecution and, therefore, must be a "fair tribunal" to adjudicate at the proposed contested hearing.

Because of the nature and seriousness of the potential deprivation of life, liberty, and property involved in a criminal prosecution, the very strictest standards in determining what is a "fair tribunal" are the standards applied to a judge

in a criminal prosecution. This Court has prescribed such standards in *Tumey v. Ohio* (1927), 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, 50 A.L.R. 1243, and *In Re Murchison* (1955), 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942. In *Tumey* this Court wrote (273 U.S. 510, 523):

> "All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion. Wheeling v. Black, 25 W. Va. 266, 270. But it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a *direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.*" (Emphasis added.)

In *Murchison* this Court borrowed some *dictum* from *Tumey* and included it in the following statement of standards for determining a "fair tribunal" in a criminal prosecution. It wrote, 349 U.S. at 136:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires *an absence of actual bias* in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end *no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.* That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible *temptation* to the average man as a judge . . . *not to hold the balance nice, clear and true* between the State and the accused, denies the latter due process of law.' Tumey v. Ohio, 273 US 510, 532, 71 L ed 749, 758, 47 S Ct 437, 50 ALR 1243. * * *" (Emphasis added.)

See, also, *Ward v. Village of Monroeville, Ohio* (1972), 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed. 2d 267, in which this Court held that a traffic violator who was forced to stand trial before a mayor whose court fines, forfeitures, costs and fees provided a substantial portion of the village's funds was denied a trial before a disinterested and impartial judicial officer as required by the Due Process Clause.

Combining these standards, a "fair tribunal" in a criminal prosecution is one free of actual bias, with no direct, personal, substantial pecuniary interest in the outcome and with no other interest strong enough to tempt a judge to be other than fair and impartial in making an adjudication. The situation here, i.e., the mere exposure to a factual complex gained during the performance of an official duty, has never been held to create in a judge an interest strong enough to "offer a possible temptation" "not to hold the balance nice, clear and true" between the parties.

A judge who issued an arrest warrant after an ex parte presentation to him of facts showing probable cause to arrest a defendant has never been held to be an unfair tribunal to adjudicate, after a contested preliminary hearing, whether that defendant should be bound over for trial. In fact, it is not a violation of due process for the same judge to issue an arrest warrant, preside at a contested preliminary hearing, adjudicate that there is probable cause to bind over the defendant for trial and, then, preside at a trial. *State v. Knoblock* (1969), 44 Wis. 2d 130, 170 N.W. 2d 781; *Waupoose v. State* (1970), 46 Wis. 2d 257, 174 N.W. 2d 503; and *Voigt v. State* (1973), 61 Wis. 2d 17, 211 N.W. 2d 445.

In the present case, the members of the Board did not possess any actual bias against Dr. Larkin, they did not

possess any direct, personal, substantial pecuniary interest in the outcome of the proceeding, and the mere fact that they had some exposure to facts about his medical practices as a result of an ex parte investigation conducted by them is not an interest strong enough to tempt them to be other than fair and impartial in making an adjudication on whether Dr. Larkin's license to practice medicine in Wisconsin should be temporarily suspended. The latter is established by the decision of this Court in *Federal Trade Comm. v. Cement Institute* (1948), 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010, quoted at length at page 26, *supra*.

The members of the Board herein meet the standards set for determining a "fair tribunal" in a criminal prosecution. They certainly, then, are a "fair tribunal" to make the administrative adjudication here involved.

2. These standards, however, should not apply in determining whether a licensing board is a "fair tribunal" to suspend or revoke a license.

It is a violation of due process for a licensing board to adjudicate if all of its members have a direct, personal, substantial pecuniary interest in the outcome of a proceeding. *Gibson v. Berryhill* (1973), 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488. Aside from this standard, the other standards for determining a "fair tribunal" in a criminal prosecution probably should not apply to licensing boards in making adjudications on whether professional and occupational licenses should be suspended or revoked. Since the Board herein meets all of the standards for a "fair tribunal" in a criminal prosecution, however, argument to the above effect

is irrelevant. Even so, some reasons for the distinction should be briefly suggested.

A licensing suspension or revocation proceeding is not a criminal prosecution. In the here enjoined contested hearing, no one was seeking to execute, incarcerate, or fine Dr. Larkin. The greatest deprivation which could result from the hearing is that the Wisconsin license of Dr. Larkin, who was also licensed to practice medicine in at least one other state, would be suspended for 3 months, subject to an additional suspension of another 3 months. Sec. 448.18 (7), Wis. Stats. This potential deprivation is miniscule compared with that in a criminal prosecution and the tribunal which may so adjudicate need not be subjected to the same strict scrutiny as in a criminal tribunal.

In a criminal prosecution one is dealing with the possible deprivation of fundamental rights not granted by a state. A license to practice medicine, to which no person has a constitutional right, is, according to *Barsky v. Board of Regents of N.Y.* (1954), 347 U.S. 442, 451, 74 S.Ct. 650, 98 L.Ed. 829, "a privilege granted by the State under its substantially plenary power to fix the terms of admission." The state, through a licensing board, grants a license to practice medicine to qualified applicants. This grant, as recognized in *Barsky*, is a conditional one and the state licensing board which made the grant can properly suspend or revoke a license for violation of the conditions of its issuance without the exact same type of "fair tribunal" required in a criminal prosecution in which the state is attempting to deprive a person of rights not granted by it.

If a judge, for some reason, is not a "fair tribunal" to try a criminal prosecution, there are other judges who can be substituted for him. If, for any reason, the total or a

majority of the membership of a licensing board or regulatory commission, et al., is not a "fair tribunal" there is no substitute. The "rule of necessity" has often and properly been applied in these circumstances to make a less than perfect tribunal a "fair tribunal."[13] This is particularly true in situations where, as here, there are the built-in safeguards of judicial review of the decision (sec. 448.18 (7), Wis. Stats.) and of the constitutionality of "any act and its application" to the licensee (sec. 227.20, Wis. Stats.); the decision may be stayed pending judicial review (sec. 227.17, Wis. Stats.), and the reviewing court can, in recognition of possible bias, strictly scrutinize the administrative decision.[14]

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13. There is reference to the rule of necessity in *Federal Trade Comm. v. Cement Institute* (1948), 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed. 1010. This Court applied the rule in *United States v. Morgan* (1941), 313 U.S. 409, 61 S.Ct. 999, 85 L.Ed. 1429.

Lower federal court decisions applying the rule of necessity include *Duffield v. Memorial Hospital Ass'n of Charleston* (S.D. W.Va. 1973), 361 F. Supp. 398; *Federal Home Loan Bank Bd. v. Long Beach Fed. S. & L. Ass'n* (9th Cir. 1961), 295 F. 2d 403; *Marquette Cement Mfg. Co. v. Federal Trade Commission* (7th Cir. 1945), 147 F. 2d 589; and *Brinkley v. Hassig* (10th Cir. 1936), 83 F. 2d 351.

State cases involving application of the rule of necessity to medical licensing suspension or revocation proceedings include: *Seidenberg v. New Mexico Bd. of Medical Examiners* (1969), 80 N.Mex. 135, 452 P. 2d 469; *Rose v. State Board of Registration for Healing Arts* (Mo. 1965), 397 S.W. 2d 570; *State of Montana ex rel. Yuhas v. Board of Medical Examiners* (1959), 135 Mon. 381, 339 P. 2d 981; and *Board of Medical Examiners v. Steward* (1954), 203 Md. 574, 102 A. 2d 248.

See also Davis, *Administrative Law Treatise*, §12.04.

14. This procedure is advocated in Davis, *Administrative Law Treatise* §12.04, p. 165. Wisconsin recognizes a strict scrutiny obligation on the reviewing court when an administrative agency is biased. *Wisconsin Telephone Co. v. Public Service Comm.* (1939), 232 Wis. 274, 329, 287 N.W. 122, 287 N.W. 593, cert. den. 309 U.S. 657.

D. If the decision of the district court is correct, all grants of adjudicative power to an administrative agency possessing and exercising investigative powers are unconstitutional.

The very nature of administrative agencies at all levels of government is that they possess and exercise a variety of powers, normally including investigative and adjudicative powers. If the decision of the lower court in this case is correct, it will have a major and destructive impact on all administrative agencies. It will also have a major and destructive impact on the conduct of the people's increasingly complex public business, for it is to handle such public business that administrative agencies were created, have been developed, and have grown in size and scope of responsibility and activity. Although administrative agencies have many faults, the decision in this case, just as the comparatively miniscule "advocate-judge-multiple-hat suggestion" rejected by this Court in *Richardson v. Perales* (1971), 402 U.S. 389, 410, 91 S.Ct. 1420, 28 L.Ed. 2d 842:

> "* * * assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity. * * *"

The decision in this case is NOT that it is a violation of due process for an agency employe or an individual board member who investigated a matter to act as an adjudicator of the same matter; it is NOT that it is a violation of due process for an individual member of a board or commission to refuse to disqualify himself or for the board or commission to refuse to disqualify him, when he is, in fact, disqualified by actual bias, direct, personal, or pecuniary interest in the outcome, prior personal involvement as an

adversary in the same matter, et al., and it is NOT that it is a violation of due process for an illegally constituted board or commission to adjudicate. The decision here IS that the mere possession and exercise of both investigative and adjudicative powers by the same agency is a violation of due process.

If this is correct, all local, state, and federal legislative grants of power to adjudicate to agencies also possessing the power to investigate the same subject or subject matter are unconstitutional as a violation of due process. This includes every major federal administrative agency and even those whose adjudications fall within the coverage of the Federal Administrative Procedure Act.

The Federal Administrative Procedure Act recognizes that an administrative agency may possess and exercise both investigative and adjudicative powers and functions. On the basis of this fact, the present decision also makes the APA unconstitutional even though §554 (d) thereof does attempt to insulate certain adjudications[15] of covered agencies,[16] which adjudications are made by agency employes, from influence by other employes possessing and exercising investigative and prosecuting powers and functions.[17]

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15. That subsection does not apply "(A) in determining applications for initial licenses; (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or (C) *to the agency or a member or members of the body comprising the agency.*" 5 U.S.C. §554 (d).

16. Some agencies, such as the Immigration Service, are not covered by the APA. See *Marcello v. Bonds* (1955), 349 U.S. 302, 75 S.Ct. 757, 99 L.Ed. 1107.

17. In fact, under the provisions of the Federal Administrative Procedure Act and contrary to the decision in this case, it is entirely proper for the members of the Wisconsin Medical Examining Board to conduct a contested hearing and to adjudicate whether or not Dr. Larkin's license to practice medicine in Wisconsin should be temporarily suspended after they had conducted an ex parte investigation of his medical practices. See note 15, *supra*.

State administrative agencies, as well as Congress in the Federal Administrative Procedure Act, have recognized that some bias may arise because of their possession and exercise of both investigative and adjudicative powers. The remedy for this has been, when agency size so permits, to make an internal separation of functions within the agency.

The erroneous decision in this case does not allow for this reasonable remedy, since it holds that the mere possession and attempted exercise of an adjudicative power violates due process if the agency also possesses and has exercised an investigative power. This not only never has been and is not the law, but it cannot be the law without destroying administrative agencies as they are now structured by Congress and by the state legislatures.

III. Under The Circumstances Of This Case, The District Court Had No Discretion To Issue A Preliminary Injunction, But If So, It Abused Its Discretion In So Doing.

A preliminary injunction is an extraordinary equitable remedy originally "fashioned for settling an ordinary clash of private interest."[18] The power to issue such an injunction is subject to abuse and particularly when, as here, it is used to enjoin the enforcement of a state statute. The federal courts must exercise their power to issue a preliminary injunction with great caution and only when the availability of that relief and the reason and necessity therefor is clearly established by the moving party. In general, see 43 C.J.S., *Injunctions*, §15, p. 426; 7 *Moore's Federal*

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18. *Mayo v. Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 322, 60 S.Ct. 517, 84 L.Ed. 774.

Practice, §65.18 [3]; and 11 Wright and Miller, *Federal Practice and Procedure*, §2948, pp. 428, 429.

A. The district court herein possessed no discretion to issue a preliminary injunction.

1. This Court has established the principles governing the availability of preliminary injunctive relief and the grounds for the granting of a motion therefor.

Various decisions of this Court have established or recognized the principles governing the availability of preliminary injunctive relief and the grounds for the granting of a motion therefor. An equitable remedy such as a preliminary injunction is not available when there is an adequate remedy at law.[19] Further, when, as here, state administrative proceedings are involved, which proceedings call into play administrative expertise, discretion, and fact finding, normally preliminary injunction is not available in the absence of exhaustion of administrative remedies. There are many decisions to this effect, and *contra*. See the discussion on this subject in *Gibson v. Berryhill* (1973), 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488. See also, *Sampson v. Murray* (1974), — U.S. — , 94 S.Ct. 937, 39 L.Ed. 2d 166.

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19. *Terrace v. Thompson* (1923), 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255; *Henneford v. Northern Pac. Ry. Co.* (1938), 303 U.S. 17, 58 S.Ct. 415, 82 L.Ed. 619; *Ex Parte Fahey* (1947), 332 U.S. 258, 67 S.Ct. 1558, 91 L.Ed. 2041; *Toomer v. Witsell* (1948), 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460; *Alabama Public Service Com'n v. Southern Ry. Co.* (1951), 341 U.S. 363, 71 S.Ct. 775, 95 L.Ed. 1016; *Beacon Theatres, Inc. v. Westover* (1959), 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed. 2d 988; *Younger v. Harris* (1971), 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669; et al.

If there is no adequate remedy at law and there has been an exhaustion of administrative remedies, if required, the grounds for or factors to be considered in determining whether to grant a motion for preliminary injunction have been established by the decisions of this Court. First, there must be "irreparable," "grave," "certain" injury to the movant if the requested relief is not granted.[20] Second, the question presented by the action must be "grave," "substantial," etc.,[21] i.e., there must be a reasonable probability or likelihood of success on the merits. As stated in *Terrace v. Thompson* (1923), 263 U.S. 197, 214, 44 S.Ct. 15, 68 L.Ed. 255, however:

"The unconstitutionality of a state law is not, of itself, ground for equitable relief in the courts of the United States. * * *" [22]

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20. *Terrace v. Thompson* (1923), 263 U.S. 197, 44 S.Ct. 15, 68 L.Ed. 255; *Massachusetts State Grange v. Benton* (1926), 272 U.S. 525, 47 S.Ct. 189, 71 L.Ed. 387; *Ohio Oil Co. v. Conway* (1929), 279 U.S. 813, 49 S.Ct. 256, 73 L.Ed. 972; *State Corp. Commission v. Wichita Gas Co.* (1934), 290 U.S. 561, 54 S.Ct. 321, 78 L.Ed. 500; *Gibbs v. Buck* (1939), 307 U.S. 66, 59 S.Ct. 725, 83 L.Ed. 1111; *Mayo v. Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774; *Watson v. Buck* (1941), 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1416; *Toomer v. Witsell* (1948), 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460; *Beacon Theatres, Inc. v. Westover* (1959), 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed. 2d 988; *Cameron v. Johnson* (1968), 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed. 2d 182; *Younger v. Harris* (1971), 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669; *Sampson v. Murray* (1974), — U.S. —, 94 S.Ct. 937, 39 L.Ed. 2d 166.

21. *Ohio Oil Co. v. Conway* (1929), 279 U.S. 813, 49 S.Ct. 256, 73 L.Ed. 972; *Massachusetts State Grange v. Benton* (1926), 272 U.S. 525, 42 S.Ct. 189, 71 L.Ed. 387; *Mayo v. Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774; and many others.

22. The disposition of *Gibson v. Berryhill* (1973), 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488, is consistent with this holding.

Further, when, as here, injunction against the enforcement or operation of a state or federal statute is involved, the granting of the relief sought must not cause undue harm to the public interest.[23]

2. The moving party has the burden of showing, by evidence, the availability of injunctive relief in his case and of establishing grounds for the granting of his motion.

The party seeking injunctive relief has the burden of showing, by evidence placed in the record, his eligibility for it and of establishing adequate grounds for the granting of his motion.[24] This burden and the decisions of this Court cited above mean that in the present case and before a preliminary injunction enjoining the enforcement and operation of a state statute could properly issue, Dr. Larkin had to prove to the Court or persuade it by proper evidence[25] that:

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23. *Pennsylvania v. Williams* (1935), 294 U.S. 176, 55 S.Ct. 380, 79 L.Ed. 841; *Virginian Ry. Co. v. System Federation* (1937), 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789; *Hecht Company v. Bowles* (1944), 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754; *Yakus v. United States* (1944), 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834; et al.

24. See such cases as *Railroad Commission of California v. Pacific Gas and Electric Co.* (1938), 302 U.S. 388, 58 S.Ct. 334, 82 L.Ed. 319; *Illinois Commerce Commission v. Thomson* (1943), 318 U.S. 675, 63 S.Ct. 834, 87 L.Ed. 1075; *Sampson v. Murray* (1974), — U.S. —, 94 S.Ct. 937, 39 L.Ed. 2d 166.

25. Counsel's briefs and letters to the court are not "evidence" and are not substitutes for evidence. They, further, are not a part of the record of the case.

a) he had no adequate remedy at law;

b) he had exhausted his administrative remedies;

c) he would suffer irreparable and certain harm if the requested relief was not granted;

d) he had a reasonable probability of success on the merits; and

e) such relief would not cause undue harm to the public interest.

3. Since the moving party herein completely failed to establish, by evidence, both the availability of such relief and grounds for the granting of his motion, the district court had no discretion to grant the motion.

The evidence in support of a motion for a preliminary injunction is normally presented by the moving party at a hearing and through the sworn testimony of the moving party and other witnesses. It may, however, be in the form of proper affidavits and other admissible written materials. See generally, 11 Wright and Miller, *Federal Practice and Procedure*, §2949, p. 469, et seq., and 7 *Moore's Federal Practice*, §65.04 [3].

In the present case, however, Dr. Larkin presented ABSOLUTELY NO EVIDENCE in any shape or form to the court, which evidence established any, let alone all, of the above-mentioned requirements for the granting of his motion for a preliminary injunction. There was no evidentiary hearing and there were no affidavits or other written evidence presented by Dr. Larkin which in any way provided

a factual basis showing the availability of equitable relief in this case or a factual basis supporting the granting of the motion.

In *Sampson v. Murray* (1974), — U.S. — , 94 S.Ct. 937, 39 L.Ed. 2d 166, this Court reversed the granting of equitable relief. In so doing, it pointed out that proof of actual irreparable injury was necessary and that (94 S.Ct. at 952):

> "* * * the record before us indicates that no witnesses were heard on the issue of irreparable injury, that respondent's complaint was not verified, and that the affidavit she submitted to the District Court did not touch in any way upon considerations relevant to irreparable injury. We are therefore somewhat puzzled about the basis for the District Court's conclusion that respondent 'may suffer irreparable injury.' * * *"

Here, also, no witnesses were heard on the issue of irreparable injury or any other issue; the amended complaint was not only unverified but the relief here granted did not even fall within the subject matter of that complaint; Dr. Larkin personally submitted no affidavits in support of his motion and the only affidavits which were submitted did not touch upon considerations relevant to irreparable injury or any other issue listed above. Further, there not only was no finding of fact and conclusion of law on the subject of "irreparable injury" but there were no findings of fact and adequate conclusions of law, at all, despite the requirements of Rule 52 (a), FRCP.

Under these circumstances, i.e., the complete and total failure of the moving party to present any evidence showing the availability of preliminary injunctive relief in this case and establishing grounds for the granting of his motion, the district court had no discretion to and could not properly grant the motion.

B. If any discretion to grant the motion was possessed by the district court, it abused its discretion.

The district court herein issued a preliminary injunction. It did this on the basis of a motion (App. 46, 47), which motion did not state "with particularity the grounds therefor," as required by Rule 7 (b), FRCP, which motion was outside the scope of the subject matter of the action (App. 18-24) and which motion did not even seek the broad relief actually granted (App. 46, 47).

The district court granted the motion despite the total absence of any evidence in any form showing that the extraordinary relief sought was available in this action. It also granted the motion despite the total lack of even an allegation that grounds for its granting existed and in the total absence of any evidence in any form establishing any ground for the issuance of a preliminary injunction.

The district court, further, made no findings of fact and conclusions of law, as required by Rule 52 (a), FRCP, either as such or in the alternative form of its decision (Jurisdictional Statement App. 2-4).[26] It, then, entered a judgment, which does not even accurately reflect the content of its decision (Jurisdictional Statement App. 5), and did so without adequate compliance with Rule 65 (d), FRCP, and with no recognition of the content of Rule 65 (c), FRCP (Jurisdictional Statement App. 5).

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26. This Court has many times pointed out the necessity and importance of compliance with Rule 52 (a) when a motion for interlocutory injunction is refused or granted. See, for example, *Sampson v. Murray* (1974), — U.S. —, 94 S.Ct. 937, 39 L.Ed. 2d 166; *Hatahley v. United States* (1956), 351 U.S. 173, 76 S.Ct. 745, 100 L.Ed. 1065; *Kelley v. Everglades Drainage District* (1943), 319 U.S. 415, 63 S.Ct. 1141, 87 L.Ed. 1485; and *Mayo v. Lakeland Highlands Canning Co.* (1940), 309 U.S. 310, 60 S.Ct. 517, 84 L.Ed. 774.

The judgment entered improperly and erroneously declared a presumptively valid state statute unconstitutional in the complete absence of any evidence to rebut the presumption and support the declaration and, then, improperly and erroneously gave the unsought relief of preliminarily enjoining *all* utilization of the state statute (Jurisdictional Statement App. 5).

This is an abuse of any discretion that the district court did possess. In fact, these circumstances demonstrate a complete lack of fundamental fairness to the members of the Board and to the citizens of the State of Wisconsin whom they represent.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the district court must be reversed and the case remanded with directions to dismiss.

ROBERT W. WARREN
Attorney General of Wisconsin

BETTY R. BROWN
Solicitor General of Wisconsin

LE ROY L. DALTON
Assistant Attorney General of Wisconsin

Counsel for Appellants

P.O. Address:
114 East, State Capitol
Madison, Wisconsin 53702

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